

LSU Journal of Energy Law and Resources

Volume 6
Issue 1 *Fall 2017*

3-23-2018

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Repository Citation

Philip J. Giorlando, *Securing Today's Sunflowers: Solar Gardens, the Shadows, and Solutions*, 6 LSU J. of Energy L. & Resources (2018)

Available at: <https://digitalcommons.law.lsu.edu/jelr/vol6/iss1/10>

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Securing Today's Sunflowers: Solar Gardens, the Shadows, and Solutions

INTRODUCTION

Members of a small neighborhood, inspired by a desire to leave their mark on the world, decide to change the way they live. To achieve this goal, they come together and create a collection of solar panels outside of the neighborhood; everyone invests money into the project and receives a portion of the energy generated. As a result, less energy is being generated from harmful practices like coal and gas conversion because this small neighborhood has done its part. One day, this group gets an unfortunate message in the mail from the Securities and Exchange Commission (SEC). When developing their solar entity, they failed to consider any of the business or legal issues; they thought that the small size and harmless nature of their enterprise made them immune. They thought that no one would have any problems with their organization because they just wanted to help the world. Yet, according to the SEC letter, this was a mistake; because their individual interest in the solar panels is defined as a “security,” the entity will need to pay fees for registration and disclosure with the SEC. Otherwise the SEC will shut down the project. A single letter delivers a devastating blow to the small neighborhood project.

Although this story is only hypothetical, it presents a realistic possibility for any solar garden development. Solar gardens are ripe for SEC oversight because these investments might be defined as a “security.”¹ This designation would be the financial downfall of any similar project whose goal is to help consumers that have a lower income access renewable energy. Compliance with federal securities registration and disclosure requirements is often very expensive, preventing lower income consumers from considering this viable alternative to their current, and likely environmentally damaging, energy practices.²

This story does not have to be sunset for solar gardens. Federal securities laws provide exemptions to security regulations that might remove the financial burdens of registration and disclosure.³ Although it is difficult to “fit” solar gardens exactly into any of the current exemptions, solar garden investments can fall into multiple exceptions with slight

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1. People invest money in alternative renewable energy to reduce the environmental damage they cause. *See* SEC v. Howey, 328 U.S. 293 (1946).

2. Crowdfunding, 80 Fed. Reg. 71,387 (Nov. 16, 2015) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249, 269, and 274), <https://perma.cc/4JH6-GGAV>.

3. 15 U.S.C. § 77c (2012); 15 U.S.C. § 77d (2015).

changes brought about through SEC regulation or Congressional enactment.⁴ Although some short term fixes are available, the best solution to the issue of overbearing security regulation fees is a long-term answer through either a revision of the transactional exemptions or an amendment to the security exemptions.

To better understand how these exemptions might apply to solar gardens, Part I of this comment will explain the basic structure of a solar garden, the applicable securities regulations, and how solar gardens might fit within the regulatory framework. Once solar gardens are placed under the metaphorical clouds of securities regulations, Part II will describe why this overcast sky could be the downfall of solar gardens. Part III will describe the potential cracks where light can get through, namely the transactional and security exemptions available, as well as what changes will allow solar gardens full access to the market. Finally, this comment will explain how the best exemption to apply depends on the size of the solar garden site.

I. LAYING THE GROUNDWORK

The first part of this section describes solar gardens and why exempting them from security regulations is beneficial. Once the benefits of solar gardens are laid bare, this section explains the provisions of securities regulations in general and how solar gardens may fit inside of this regulatory framework. The next part of this section looks at the case law surrounding the judicial definition of a security and places the structure of a solar garden inside that definition.

A. Tilling the Soil: Why Solar Gardens?

Solar energy generation has increased in popularity due to its environmental benefits, low maintenance requirements, and predictable energy production.⁵ The Solar Energy Industries Association (SEIA), collaborating with Green Tech Media (GTM) Research, has predicted that the United States solar market is set to grow by 119% in 2016.⁶ The primary source of residential solar energy is rooftop panels.⁷ Solar gardens provide access to solar energy generation for new and previously unconsidered consumers. Apartment tenants, house lessees, and condominium owners are

4. 15 U.S.C. § 77b(b) (2012).

5. *US Solar Market Set to Grow 119% in 2016, Installations to Reach 16 GW*, SOLAR ENERGY INDUSTRIES ASSOCIATION (Mar. 9, 2016), <https://perma.cc/G4PX-LBD5>.

6. *Id.*

7. *Id.*

often left out of rooftop installations because they either do not have a roof at all, or do not own it. The renter is usually the one paying the energy bill, so he may like to partake in renewable energy practices in some way, especially if it means lowering his energy costs. Solar gardens fill this void because they do not require a roof at all.

Renters are not the only people left out of renewable energy because of the traditional systems; in fact, only twenty-five percent of homeowners are able to have solar panels on their roofs because the roof is unstable, too small, or is not oriented in the right direction to receive sunlight.⁸ These previously precluded homeowners can now access solar energy without having to install a new roof. In general, these renters and homeowners with weak roofs are more likely to populate lower income brackets than the typical solar panel customer.⁹ The solar garden is an innovative structure that, unlike any current model, provides viable access to solar energy generation for lower income customers.¹⁰ This access will help solar gardens achieve greater penetration into the renewable energy market.

Rather than the individual investing in a single rooftop installation or with an industrial utility company, the panels in a solar garden are at an off-site location large enough for groups of investors to participate in the same site.¹¹ This location can be the roof of a church,¹² school,¹³ or a piece of land.¹⁴ This focus on local energy development allows for more awareness of environmentally-friendly practices and promotes the local job market.¹⁵ For solar gardens to successfully change energy consumption practices, the target market must expand beyond neighborhoods with only a handful of customers. If solar gardens expand, more potential investors will have

8. See PAUL DENHOLM & ROBERT MARGOLIS, NAT'L RENEWABLE ENERGY LAB., NREL/TP-6A0-44073, SUPPLY CURVES FOR ROOFTOP SOLAR PV-GENERATED ELECTRICITY FOR THE UNITED STATES (2008) at 4, <https://perma.cc/XVW5-4CPX>.

9. Jesse Bricker et al., *Changes in U.S. Family Finances from 2010-2013: Evidence from the Survey of Consumer Finances*, FED. RES. BULL., Sept. 2014, at 1, 4.

10. See JASON COUGHLIN ET AL., NAT'L RENEWABLE ENERGY LAB., Subcontract No. AGJ-0-40314-01, A GUIDE TO COMMUNITY SOLAR: UTILITY, PRIVATE, AND NON-PROFIT PROJECT DEVELOPMENT (2010) at 20, <https://perma.cc/4HZ6-JUXQ>.

11. *Id.*

12. The University Park Community Solar LLC in Maryland uses a local church roof. *See id.*

13. The Solar for Sakai project in Washington uses the roof of a school. *See id.* at 25.

14. The Clean Energy Collective, LLC uses land off site. *See id.* at 22.

15. 2015 saw nearly 209,000 solar workers and expected to see an increase of 14.7% by 2016. *See* THE SOLAR FOUND., NATIONAL SOLAR JOBS CENSUS 2015 5 (2016), <https://perma.cc/VLM8-9Y9D>.

access to them; when more investors are available, individuals can make smaller investments in projects that would have originally required larger capital investments per person. This in turn provides lower income consumers with opportunities in solar garden projects.

B. Plowing the Field: The Structure of a Solar Garden

There are multiple ways to financially structure solar gardens, yet the focus of this comment is on the special purpose entity.¹⁶ In a special purpose entity, individual investors come together to join a business enterprise and develop the solar garden.¹⁷ These individual investors own the solar garden, have all rights to the energy it produces, and any auxiliary incentives that are derived from it.¹⁸ An individual investor can invest in as much of the solar site as he is able, considering his capital and how much energy he wants calculated for his financial benefit. The investors normally create a solar services agreement with a third-party developer to create, maintain, and host the solar garden.¹⁹ This host can be the owner of the structure containing the panels or another business that is sophisticated in reference to solar gardens and their structure.²⁰ The host, as owner of the location, is provided a portion of the energy produced by the site as a form of payment for its services.²¹

Once the solar garden is funded and developed and the maintenance plan is set up, the solar garden entity must determine how to utilize the energy. The entity typically creates a power purchase agreement with a single utility company that every investor uses.²² As the wholesale producer of the energy, the members of the entity are currently unable to use the energy in their own homes. The utility company, through the power purchase agreement, purchases the energy from the solar garden and, in exchange, will deduct costs from the investors' energy bills in proportion to the energy generated from the solar panels they own.²³

This deduction to the investor's energy bill is merely one benefit of solar gardens. The utility company also gets to use the energy generated from solar panels, a renewable and environmentally friendly resource,

16. Some other potential financial models are the utility-sponsored model and the non-profit model. The security regulation issues regarding these are easier to address. *See* COUGHLIN ET AL., *supra* note 10, at 15.

17. *See id.* at 6.

18. *See id.* at 7.

19. *See id.* at 5.

20. *See id.* at 15.

21. *See id.* at 5.

22. *See id.*

23. *See id.*

rather than energy from coal or gas. This environmental benefit has its own financial aspect as well, called a Renewable Energy Credit (REC).²⁴ RECs are typically sold along with the energy to the utility company, which is directly creating the environmental benefits that they represent.²⁵ Once the site of the solar garden is established, the investors can enjoy the financial and environmental benefits of the energy it generates throughout its useful life, which can be over twenty-five years.²⁶

Consumers previously unable to participate in solar energy generation through traditional means can now access solar energy through these gardens. Where solar panels once required a foundation of sturdy roofs, they now create untapped potential for solar energy and should be promoted by federal regulations.

C. Purchasing Pesticides: Security Regulations Explained

Federal security regulations came about because of fraudulent activities, which were partly to blame for the Great Depression.²⁷ Congress first responded to these activities with the enactment of the Securities Act of 1933 (“‘33 Act”),²⁸ which requires disclosure by any company making a public distribution of securities.²⁹ A company distributes securities in the form of ownership in the company in exchange for money.³⁰ The company must “register” the public offering with the SEC, an agency established by the Securities Exchange Act of 1934 that is responsible for maintaining and overseeing the registration and disclosure of all public offerings.³¹ These companies are required to disclose information on all significant aspects of their business, including management activities, extensive financial information, the business’s solvency, and risk factors of the specific security.³² The purpose behind the disclosure of this detailed information is to give the average investor all of the information needed to fully assess the merits of the security.³³

24. *See id.* at 4.

25. *See id.*

26. *See id.* at 49.

27. *See* JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 3 (Vicki Been et al. eds., 6th ed. 2009).

28. *See id.*

29. *See id.* at 4.

30. A security is “an instrument of investment in the form of a document (as a stock certificate or bond) providing evidence of its ownership.” *See* MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/DAT7-NM52>.

31. *See* COX ET AL., *supra* note 27, at 11.

32. *See id.* at 4.

33. *See id.*

The Act of 1933 and its successors provide multiple remedies to investors harmed by violations of securities laws.³⁴ The Act also provides antifraud provisions to “prevent material omissions and misrepresentations in connection with the offer or sale of securities.”³⁵ These remedies and provisions are also present in the Securities Exchange Act of 1934.³⁶ Therefore, solar garden entities must carefully consider the applicable regulations due to the severe legal and financial impacts they can have on solar gardens.

The reason the requirements of securities regulations are so problematic for solar gardens is that registration is prohibitively expensive for potential investors. The SEC has estimated that the average compliance cost associated with conducting an initial public offering is \$2.5 million and is followed by an ongoing compliance cost for issuers, once public, of \$1.5 million per year.³⁷ Even though solar gardens are typically smaller than the average company making an initial public offering, the above costs are still unbearable. The target customers of a solar garden, namely renters and others who do not have access to rooftop panels, are likely unable to afford these excessive costs for registration and disclosure. These expenses will force the average customers to stay in their current situation because they would prefer the comfort of their utility company to the weeds of new solar energy generation.³⁸

II. PLANTING THE SEEDS: ARE SOLAR GARDENS SECURITIES?

Before considering the options to avoid the financial burdens of security regulations, the investors must determine whether the SEC will consider solar garden investments as securities. There are multiple definitions of a security provided in the ‘33 Act,³⁹ but the most likely definition for a solar garden is an “investment contract.”⁴⁰ The United

34. See THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 1:17 (2017).

35. *Id.*

36. See *id.* at § 1:18.

37. Crowdfunding, 80 Fed. Reg. at 71,482.

38. State security regulations, or blue sky laws, are also applicable regarding solar gardens. Although the National Securities Markets Improvement Act weakened the impact of blue sky laws regarding the imposition of registration and reporting requirements, this is still a hurdle that any solar garden entity will need to address. Because of the number and variety of blue sky laws, this topic is too broad to fully address in this Comment, but the issue of state securities regulations will be considered for the merit of certain solutions. See HAZEN, *supra* note 34, at § 1:15.

39. Including a note, stock, treasury stock, and bond. See 15 U.S.C. § 78c(a)(10) (2012).

40. See *id.*

States Supreme Court provided a concise explanation of an investment contract in *SEC v. W.J. Howey Co.*⁴¹

A. Howey Explained

In *Howey*, the United States Supreme Court considered whether interests in orange groves purchased specifically for a profit were considered “investment contracts.”⁴² W.J. Howey Co., a Florida company, sold approximately 250 acres of orange groves to the public and provided a service contract to cultivate and develop the crops for the purchasers.⁴³ The purchasers did nothing to maintain the groves because the servicers under the contract had “full and complete possession” of the interest acres.⁴⁴ The interest was not itself a right to any of the fruit, but was only a right to a portion of the profits based on the amount of the grove owned.⁴⁵ The Supreme Court declared that an investment contract is “a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party.”⁴⁶ The Court went on to find that the investments in the orange groves in *Howey* met the definition of an investment contract.⁴⁷ This definition has been developed through subsequent cases and is primarily considered to be a four-part definition: (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits, and (4) solely from the efforts of a third party.⁴⁸ A deeper analysis of these factors will shed light on the characterization of solar gardens.

Key things to consider prior to a full analysis of these four factors are the timing of the analysis and the relationship between the parties. First, courts determine the existence of the elements at the time the investor purchases the interest.⁴⁹ Also, as an investment *contract*, some form of contractual relationship is required.⁵⁰ Contracts with multiple contractual relationships and parties can satisfy the test as long as all four elements are

41. 328 U.S. 293.

42. *Id.*

43. *Id.* at 295.

44. *Id.* at 296.

45. *Id.*

46. *Id.* at 298-99.

47. *Id.* at 299.

48. See ARNOLD S. JACOBS, DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS, § 9:65 (2016).

49. See *id.*

50. Although the *Howey* definition states a “contract, transaction, or scheme,” the Supreme Court has not used these words in recent cases. See *id.*

satisfied.⁵¹ Finally, courts focus on the significant parts of the investment when there are security and non-security aspects.⁵²

1. *An Investment*

Over time, courts have modified the definition for the first element of an investment contract.⁵³ Subsequent courts dropped “money” from the definition, and it was later added again.⁵⁴ Clearly, investing money meets the first element, but courts have recognized other assets and contributions as well.⁵⁵ Typically, an investment requires “a commitment of assets in such a manner as to subject oneself to financial loss.”⁵⁶

This issue came up in *United Housing Foundation v. Forman*, where the United States Supreme Court considered whether investing money into shares as a form of rent payment for an affordable living facility is an investment contract.⁵⁷ The United Housing Foundation sponsored and developed Co-op City, a New York housing cooperative that provided decent low-income housing.⁵⁸ To have an apartment in Co-op City, a purchaser was required to buy eighteen shares of stock for each room desired, at the price of \$25 per share.⁵⁹

The Court first stated that the name given to an interest is not relevant in deciding whether it is an investment.⁶⁰ It is unreasonable to believe that federal securities laws apply because the instrument is called a “stock.”⁶¹ The decision depends on the substance of the investment, or “the economic realities of the transaction;”⁶² in this case, “an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others,” slightly differs from *Howey*.⁶³ Regarding the economic realities of the *Forman* facts, the Court differentiated between an “investment” and “purchas[ing] a commodity for personal consumption.”⁶⁴ The “investors” were not interested in

51. *See id.*

52. *See id.*

53. *See id.* at § 9:66.

54. *See* *United Hous. Found. v. Forman*, 421 U.S. 837 (1975); *S.E.C. v. Comcoa Ltd.*, 855 F. Supp. 1258, 1260 (S.D. Fl. 1994); *S.E.C. v. Edwards*, 540 U.S. 389, 397 (2004).

55. *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 560 (1979).

56. *See* JACOBS, *supra* note 48, at § 9:66.

57. 421 U.S. 837.

58. *Id.* at 841.

59. *Id.* at 842.

60. *Id.* at 850.

61. *See id.* at 851.

62. *See id.*

63. *Id.* at 852.

64. *Id.* at 858.

financial returns from purchasing shares in the “stock,” but were interested in purchasing a place to live at a good price.⁶⁵ The Court pointed out that the motive of purchasing something at a good price “characterizes every form of commercial dealing” and is not a financial endeavor requiring regulation by securities laws.⁶⁶

This concept of an investment clearly requires a factual analysis of the particular investment project to determine if the project meets the first required element of an investment contract. The motive behind the parties, the “economic realities” of the interest, and the financial benefits actually received are all factors to consider. Therefore, individuals pursuing potential solar garden projects must carefully consider the structure and benefits of the project in order to avoid this first element, and thus avoid regulation as a security.

2. In a Common Enterprise

Interpretation of the second element of an investment contract, a common enterprise, is split among courts.⁶⁷ One set of courts recognizes “horizontal commonality” as the second element.⁶⁸ Other courts recognize the broader and easier to satisfy definition of “vertical commonality.”⁶⁹

Horizontal commonality requires pooling investments together and sharing profits and losses. The pooling of investments implies that the success of the enterprise necessarily leads to the success of the investors.⁷⁰ Courts are still considering the meaning of sharing in profits and losses as well. The Supreme Court in *Lavery v. Kearns* held that there is no horizontal commonality when investors do not share profits, but the promoter’s efforts are needed for the individual profits of the investors.⁷¹

Vertical commonality is further divided into “broad” and “narrow” commonality.⁷² Broad vertical commonality only requires the investments being interwoven or dependent on the efforts of other investors or third parties.⁷³ Pooling investments is not required and vertical commonality can occur with only one investor so long as it meets the dependence requirement.⁷⁴ The third party simply performing the efforts necessary to produce the profit

65. *Id.*

66. *Id.*

67. *See* JACOBS, *supra* note 48, at § 9:67.

68. These courts include the Third, Sixth, and Seventh Circuits. *See id.*

69. The Fifth, Ninth, Tenth, and Eleventh Circuit Courts support vertical commonality. *See id.*

70. *Berman v. Bache*, 467 F. Supp. 311, 318-19 (S.D. Ohio 1979).

71. *Lavery v. Kearns*, 792 F. Supp. 847, 857-58 (D. Me. 1992).

72. *See* JACOBS, *supra* note 48, at § 9:67.

73. *See id.*

74. *See id.*

is not enough to meet the dependence requirement.⁷⁵ Narrow commonality requires a direct connection between the success and failure of the third party and the investor.⁷⁶ There needs to be a “direct correlation” between the success and failure of the promoter and that of the investor.⁷⁷

3. *A Reasonable Expectation of Profit*

The third element of *Howey*’s definition of an investment contract can be split into two parts, the first part being “profit.”⁷⁸ The Supreme Court in *Forman* provided the primary definition of profit by stating that it means “either capital appreciation . . . of the initial investment . . . or a participation in earnings.”⁷⁹ Courts considered this the exclusive definition until *SEC v. Edwards*, where the United States Supreme Court ruled that “[t]here is no reason to distinguish between promises of fixed returns and promises of variable returns.”⁸⁰ The previous definitions provided in *Forman* were variable in nature, depending on the relative success or failure of the investment. The *Edwards* Court has extended this definition to include fixed payments such as periodic payments.⁸¹ Therefore, the definition of profits is now broad enough to include most financial returns on an investment.

The Supreme Court in *Forman* also disposed of the idea that a deduction in the monthly rent charge applied to mortgage interest is not profit;⁸² therefore, tax deductions for a tax sharing agreement are not considered profits.⁸³

The second part of this element of an investment contract is the “reasonable expectation” of profits.⁸⁴ In *Forman*, the Court discussed this issue under two ideas: the motives of the investors and the speculative nature and insubstantiality of the profits.⁸⁵ The motive of the investors, because it resides in the mind of the investor, is a difficult factor to consider. For a reasonable expectation of profits to exist, the “investor’s

75. *See id.*

76. *See Brodt v. Bache & Co., Inc.*, 595 F.2d 459, 461 (9th Cir. 1978).

77. *See id.*

78. *See JACOBS, supra* note 48, at § 9:68.

79. 421 U.S. at 852.

80. 540 U.S. at 394.

81. *Id.* at 390.

82. 421 U.S. at 855.

83. *See JACOBS, supra* note 48, at § 9:68. A tax sharing agreement is a contract in which a group allocates individual tax liability among themselves in a specific arrangement. *See Dale Ponikvar & Russel Kestenbaum, Aspects of the Consolidated Group in Bankruptcy: Tax Sharing and Tax Sharing Agreements*, 58 TAX L. 803, 826 (2005).

84. *Id.*

85. *Id.*

dominant motive is to seek a profit rather than consume an item.”⁸⁶ Motive can be discovered through evidence such as the promoter’s materials and testimony of the investor.⁸⁷ Since reasonableness is required, the testimony of the investor should be weighed against that of a reasonable man in his position. This means that a reasonable expectation of profits can exist even if profits are never actualized.⁸⁸ With regard to the substantiality of the investment, this is an objective analysis that the court can consider regardless of the expectations of the parties.⁸⁹

4. Profits Derived Solely From the Efforts of a Third Party

Although the United States Supreme Court in *Howey* described the fourth element as profits derived solely from the efforts of a third party, *Forman* and other subsequent courts have slightly changed the element to include profits derived from the “entrepreneurial or managerial efforts of others.”⁹⁰ Lower courts have delineated from the idea held in *Howey* that the profits must be derived *solely* from the efforts of others.⁹¹ Now courts consider whether the efforts made by others are “the undeniably significant ones”⁹² and whether the investor has only “nominal or limited responsibilities.”⁹³ The U.S. Supreme Court is still not clear on whether this element is required to be “solely” from the efforts of others.⁹⁴

Whether profits are “solely” from efforts of a third party depends on the participation and control of the investors.⁹⁵ Profits are unlikely to be solely from others as the participation and control of the investors increases. A factor to consider regarding participation and control is management agreements and the investor’s motives behind the agreement.⁹⁶ Courts have agreed that a management agreement will only meet this element if the investor was required to reach out to the third party as an economic practicality.⁹⁷ Courts have recognized multiple factors to consider, including: the amount of money invested, the special knowledge or skills required to manage the investment, the investor’s sophistication, and the investor’s

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *See* S.E.C. v. Unique Fin. Concepts, Inc., 196 F.3d 1195, 1201 (11th Cir. 1999).

92. *Id.*

93. *Steinhardt Group Inc. v. Citicorp*, 126 F.3d 144, 153 (3d Cir. 1997).

94. *See* JACOBS, *supra* note 48, at § 9:69.

95. *Id.*

96. *Id.*

97. *Id.*

access to information.⁹⁸ Courts should also consider the powers the investor retains in the management agreement.⁹⁹

The actual managerial or entrepreneurial tasks are questions of fact, which depend on what the investor reasonably believed he had to provide at the time of the purchase.¹⁰⁰ Further, the relationship between the investor and the third party is important because if the investor has control over the third party, then it is possible that this would preclude the investment from qualifying as an investment contract.¹⁰¹ Having control over the party, such as an employee, performing the managerial tasks is only an extension of the investor's control and efforts.

B. Structuring the Garden to Avoid Being a Security

Avoiding characterization as an investment contract requires avoiding one of the four elements described above.¹⁰² Solar gardens have the best chance of avoiding the "common enterprise" element, the "reasonable expectation of profit" element, or the "derived solely from the efforts of third parties" element.

1. Making Solar Gardens Uncommon Enterprises

Solar garden investors should first consider where the courts in their jurisdiction stand regarding the common enterprise requirement. Unfortunately for solar gardens, it seems as though the more inclusive definition, vertical commonality, is the more popular stance.¹⁰³ It is still possible to structure the solar garden in such a way as to avoid this definition, so there are opportunities to avoid regulation here. For the sake of allowing all solar gardens to avoid this element, this section will focus on avoiding vertical commonality, which will in turn avoid horizontal commonality.

Vertical commonality requires the success or failure of the investor to depend on the success or failure of the third party, and it doesn't consider the pooling of money.¹⁰⁴ Regarding solar gardens, the success or failure of the investor depends on the maintenance company and the utility company. If the solar garden investors decide to hire out the maintenance of the solar panels, the success of the maintenance company would lead to the success of the investors. This success is because maintaining the solar

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *See* 792 F. Supp. at 860.

103. *See* JACOBS, *supra* note 48, at § 9:67.

104. *Id.*

garden will allow for more long-term energy generation. This element of commonality is interrelated with the managerial efforts requirement for how profits are derived. The third party cannot perform the “efforts necessary to produce the profit” if the investors want to avoid the “common enterprise” element.¹⁰⁵ The maintenance team can be successful in cleaning the solar panels, but because of some extenuating circumstance, such as consistent cloudy weather or the utility company, the panels may not get energy, and profits may not accrue. Therefore, there is no direct connection between the success of the maintenance team and the success of the investors. This allows the investors to avoid the common enterprise element, and, thus, classification as an investment contract. Similarly, the utility company can be very successful, but have nothing to do with the success of the investors. The utility company will sell the same amount of energy to their market of consumers; the only thing that would change is the source of the energy sold. Therefore, it is very likely for solar gardens to avoid the common enterprise element of an investment contract.

2. Avoiding the Reasonable Expectation of Profit

Solar gardens and their investors have a great opportunity to avoid security regulations through this element. A key benefit of renewable energy generation is to promote and facilitate environmentally friendly practices. Conventional forms of energy cause damage to the environment by polluting the air with emissions created by the conversion of energy.¹⁰⁶ These decreases in emissions and environmental protections are likely the primary reason consumers invest in solar energy.¹⁰⁷ If structured and presented properly, solar garden ventures can avoid regulation by presenting this as the dominant motive for investment.

The returns most likely to be considered “profits” are the deductions in the investor’s energy bill. This deduction would likely be considered a form of “earnings” rather than capital appreciation.¹⁰⁸ For solar gardens to avoid this element, the best route is through the motive of the investors or the nature of the investment as insubstantial or speculative.

105. *Id.*

106. The electricity sector produced more greenhouse gases than any other sector in 2014, including the industrial sector. Coal combustion accounted for 77 percent of those greenhouse gases. *See Greenhouse Gas Emissions: Sources of Greenhouse Gas Emissions*, EPA (last updated Apr. 14, 2017), <https://perma.cc/J7DN-5PJU> [hereinafter *Emissions*].

107. *See* Akila Triggs, *3 Reasons to Invest in Solar Energy*, SMART GRID (Aug. 16, 2016), <http://www.whatissmartgrid.org/featured-article/3-reasons-to-invest-in-solar-energy>.

108. Both of these are considered profits, with capital appreciation being the increase in value of the initial asset over time. *See* 421 U.S. at 852.

Unfortunately, since this element is a heavily fact sensitive analysis with many ambiguities, there is no sure way to avoid this element without avoiding profits altogether. Advertising properly and promoting certain practices throughout the arrangement can address the motive of the investors. As stated above, promoting environmentally friendly practices is a main benefit of solar gardens and is likely the primary benefit for many investors. The promoters of the solar garden, through their advertising documents, can take the first step in avoiding this element. Having documents that downplay the financial benefits and promote the environmental benefits would weigh in favor of the environmental benefits as the “dominant motive.”¹⁰⁹ Further, by promoting other environmentally friendly practices aside from the renewable energy, such as recycling and sustainable transportation practices, the promoter of the solar garden can show that the motive is not profit, but protecting the environment.

Showing that the profits derived from solar gardens are speculative or insubstantial will require a more objective analysis. Courts have looked to the testimony of the investors and the promotional materials of the issuer in determining whether or not the profit is speculative or insubstantial.¹¹⁰ Further, the opinions of the parties seem to have greater weight than the analysis of the facts of the investment.¹¹¹ Therefore, the best way to avoid this element is through careful advertising along with a well-rounded approach to the environmental benefits that are likely the major goal.

3. *Deriving Profits from Somewhere Else*

If courts decide that there are profits generated from solar gardens, the managerial efforts that lead to these profits are likely the managing of the maintenance of the panels and the collection of energy by the utility company. The investors will likely hire someone to manage these agreements and keep the investors informed regarding the solar garden. First, this manager would only be necessary if the solar garden is large. If the garden is small enough, the investors could simply manage these agreements as a group or select one person to be the voice of the investors.¹¹² This would be one way to avoid characterization as a security.

109. See JACOBS, *supra* note 48, at § 9:68.

110. See *United Hous. Found.*, 421 U.S. at 853-54.

111. A Ponzi scheme, with no factual evidence for profit, would still meet this element because the expectations of the parties support a reasonable expectation. See JACOBS, *supra* note 48, at § 9:68.

112. The University Park Community Solar LLC is a member managed solar site developed in a neighborhood in Maryland. The profits here are derived from the managerial efforts of the 36 members. See COUGHLIN ET AL, *supra* note 10, at 20.

The long-term goals are to expand access to renewable energy and have larger solar gardens. These larger solar gardens will likely need to hire out the managerial practices to someone else, or designate a sophisticated investor as the manager.¹¹³ The first and easiest way for larger solar gardens to avoid this element is by allowing the investors to maintain control over the maintenance company. If the investors have the power to remove the manager at will, veto his decisions, or reserve the right to manage on their own, then there would be no investment contract.¹¹⁴ Additionally, the agreement can also avoid this element by providing the investors with full access to information and allowing the investors to visit the site and offer managerial suggestions on some basis.¹¹⁵

The maintenance process of the solar panels depends on the sophistication of the panels themselves.¹¹⁶ If the maintenance process simply involves cleaning the panels on a regular basis, this is something that does not require specialized skill and could potentially be done by the investors themselves.¹¹⁷ If the panels are more sophisticated, such as having moving parts, then it is likely that this will require more specialized care and managerial supervision.

III. IF OVERCAST SKIES STILL LOOM

Although investors and promoters can structure solar gardens in a way to avoid characterization as a security, it may still be unfeasible for some solar gardens to avoid this outcome. With this characterization, solar gardens will be enveloped into the folds of full securities regulations.¹¹⁸ The stifling burden of registration and disclosure with the SEC, an exorbitantly expensive process,¹¹⁹ will likely block out any potential that solar gardens have to expand renewable energy use in the United States.

By requiring solar gardens to register and disclose detailed information to the SEC, these regulations are increasing the cost of the investment that potential consumers will need to contribute to be able to participate in a solar garden. This increase in cost will lead lower income consumers away from solar gardens, remaining stagnant in their current, and environmentally

113. A sophisticated investor is one whose reliance on the defendant's statements has a greater presumption of reasonableness. *See HAZEN*, *supra* note 34, at § 12:90.

114. *See JACOBS*, *supra* note 48, at § 9:69.

115. *See id.*

116. *See* U.S. AGENCY FOR INT'L DEV., SOLAR PV SYSTEM MAINTENANCE GUIDE 1 (2013), http://poweringhealth.org/Pubs/Guyana_Solar_PV_Systems_Maintenance_Guide.pdf.

117. *See id.*

118. *See COX ET AL.*, *supra* note 27, at 19.

119. Crowdfunding, 80 Fed. Reg. at 71,482.

harmful, energy practice.¹²⁰ This will prevent both the expansive opportunities lying dormant within the renters and community living consumers of the nation and the expansion of awareness of environmentally friendly practices. Additionally, the protections afforded to investors of solar garden entities through securities regulations are possibly not worth the price. The structure of solar gardens is very clear and straightforward, and the financial changes are easily predicted once the initial energy output is determined.¹²¹ The registration and vigorous disclosure efforts would not provide any new information to the investors and would not be worth the large investment increase.

This inefficient protection is why securities regulations need to change to allow for the benefits that solar gardens would bring to the nation. By opening the doors to a solar garden generation, a more efficient and effective solar model can enter the market and potentially be the new primary source of energy in many places. This change would not bring about any serious disturbance to securities regulations and only requires slight changes to the exemption provisions in order to allow solar gardens to reach their full potential.

A. Letting the Light Shine Through: How Solar Gardens Blossom

The most appropriate solution for any solar garden project depends on the structure of the project. Smaller, community-focused projects will require different exemption conditions than larger scale, industrial-level projects. For some smaller scale projects, certain transactional exemptions under section 4 of the Securities Act of 1933 could allow for release from the registration requirements that would prevent consumer access.¹²² Larger scale projects would likely require a full security exemption under Section 3 of the Act.¹²³ The best long-term solution for solar gardens of any size to reach as many customers as possible is an exemption that allows for both the initial purchase and transfer of the security without such burdensome registration and disclosure costs.

120. The electricity sector produced more greenhouse gases than any other sector in 2014, including the industrial sector. Coal combustion accounted for 77 percent of those greenhouse gases. See *Emissions*, *supra* note 106.

121. One of the few things that affect solar generation consistency is cloud coverage, but this may be changing very soon. See *Making Solar Power Generation More Predictable*, UC SAN DIEGO (last visited July 25, 2017), <https://perma.cc/L72D-DWDL>.

122. 15 U.S.C. § 77d (2015).

123. 15 U.S.C. § 77c(a) (2012).

1. Small Scale Solutions for Small Scale Solar Gardens: Transaction Exemptions

Transactional exemptions exclude from federal securities regulations the initial sale of certain investment interests from the issuer to the customer.¹²⁴ If the purchaser of the interest resells it to another party, then that transaction would not be exempt and would trigger full registration and disclosure requirements.¹²⁵ This reselling limitation is the reason only smaller local projects would use these exemptions in practice. Regardless, the transaction exemptions most likely used by smaller solar garden projects are two small issues exemptions: a private placement exemption and an intrastate offering exemption.¹²⁶

In October of 2016, the SEC promulgated new rules and amended some rules already in place.¹²⁷ The SEC has amended Rule 504, the small issues exemption, and repealed Rule 505 of Regulation D.¹²⁸ Further, the SEC has amended Rule 147, the intrastate offering exemption, and added Rule 147A under Section 3(a)(11) of the Act of '33 to expand this exemption.¹²⁹

a. Rule 504: Small Issues Exemption

Under Rule 504, promulgated under Section 3(b) of the Act of '33 and also as part of Regulation D, the SEC provided a transaction exemption for small offerings with an aggregate price of less than \$5 million.¹³⁰ Rule 504 also requires the offering to be registered with the applicable state securities laws. Unfortunately, state regulations are often more stringent than federal regulations because they include merit regulation standards where the issuer needs to prove the substantive value of the offering to a state security administrator.¹³¹ While an investment in solar energy generation would likely satisfy the merit standards, most states also have general solicitation prohibitions, caps on nonaccredited investors, and

124. See JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 27:15 (2016) [hereinafter CORPORATIONS].

125. See *id.*

126. 15 U.S.C. § 77d(a)(5), § 77d(a)(2) (2015); 15 U.S.C. § 77c(a)(11) (2012).

127. Press Release, SEC, SEC Adopts Final Rules to Facilitate Intrastate and Regional Securities Offerings (Oct. 26, 2016) (on file with author).

128. *Id.*

129. *Id.*

130. The aggregate offering price includes all securities offered within the past twelve months under either a section 3(b) exemption or in violation of section 5 are included in calculating. *Id.* See also CORPORATIONS, *supra* note 124.

131. See COX ET AL., *supra* note 27, at 16.

suitability requirements for sales to nonaccredited investors.¹³² These conditions are more difficult for solar garden projects to address and will likely inhibit growth.

Luckily, the state legislative forum is more approachable than Congress by solar garden supporters, so it would be much easier to present to the state legislature the benefits that an exemption more sympathetic towards solar gardens would provide for their state. Some states have already passed regulations that more closely mirror Rule 504 and are less restrictive regarding their requirements.¹³³ This route of exemption from securities regulations is the most efficient for smaller solar gardens because they would be exempt from both federal and state regulations. However, it would be a poor long-term solution for full consumer participation because of the aggregate offering price limit and would require a great deal of lobbying in many state legislatures. An easier route is likely available that would allow for both federal and state exemption without the limitations.

b. Section 4(a)(2): The Private Placement Exemption

The private placement exemption under Section 4(a)(2) provides an exemption for “transactions by an issuer not involving a public offering.”¹³⁴ Courts and the SEC have developed multiple factors regarding this vague provision.¹³⁵ These requirements include few offerees and a small offering, although the specific amounts are not explained.¹³⁶ Each offeree should also have access to the information that the issuer would disclose if required to register with the SEC.¹³⁷ The offerees must be sophisticated, both in business and in the investment offered, in order for the exemption to apply to the transaction.¹³⁸ Finally, the issuer cannot advertise the offering through general solicitation.¹³⁹

132. See Stuart R. Cohn, *The Impact of Securities Laws on Developing Companies: Would the Wright Brothers Have Gotten Off the Ground?*, 3 J. SMALL & EMERGING BUS. L. 315, 341 n.80 (1999). An accredited investor is one “whose individual net worth, or joint net worth with that person’s spouse, exceeds \$1,000,000” or “who had an individual income in excess of \$200,000 in each of the two most recent years . . . and has a reasonable expectation of reaching the same income level in the current year.” 17 C.F.R. § 230.501(a) (2017).

133. 17 C.F.R. § 230.504 (2017).

134. 15 U.S.C. § 77d(a)(2) (2015).

135. See CORPORATIONS, *supra* note 124.

136. See *id.*

137. See *id.*

138. See *id.*

139. See *id.*

Because of confusion regarding Section 4(a)(2) of the Act, the SEC promulgated Rule 506 as a safe harbor for companies.¹⁴⁰ Under Regulation D, this safe harbor provides clarification and a safe route for businesses to ensure access to Section 4(a)(2). First, Rule 506 requires that the offering is limited to thirty-five purchasers.¹⁴¹ These purchasers exclude relatives of the issuer and accredited investors.¹⁴² Since solar gardens are designed for natural persons, the pertinent portion of the definition of an accredited investor is one “whose individual net worth, or joint net worth with that person’s spouse, exceeds \$1,000,000” or “who had an individual income in excess of \$200,000 in each of the two most recent years . . . and has a reasonable expectation of reaching the same income level in the current year.”¹⁴³ These unaccredited investors must be sophisticated regarding the financial aspects of investing and specifically, regarding this investment.¹⁴⁴ Therefore, the issuer needs to provide some financial information to the purchasers, although less than what is fully required under Section 5 of the 1933 Act.¹⁴⁵ Finally, Rule 506 prohibits general solicitation by the issuer or any representative.¹⁴⁶

Most current solar garden projects would meet the thirty-five-investor requirement because of their community-focused nature. Unfortunately, this cap on purchasers prevents future economies of scale for solar gardens and also causes the project to require a larger investment by each purchaser.¹⁴⁷ This consequence of larger individual investments directly contradicts the purpose of solar gardens, which is providing environmentally friendly energy practices to lower income investors. Thus, this exemption could only be a short-term solution for some solar garden projects, and not a long-term doorway through federal securities regulations for solar gardens.

Since small and local solar garden projects can be advertised by word of mouth, the general solicitation prohibition would not prevent their access to this exemption. This condition, however, would severely limit the size of the project and prevent future growth. Only the smallest and most locally oriented projects would be successful while meeting this condition.

140. *See id.*

141. 17 C.F.R. § 230.506 (b)(2)(i) (2013).

142. 17 C.F.R. § 230.501(e) (2017).

143. 17 C.F.R. § 230.501(a) (2017).

144. 17 C.F.R. § 230.506(b)(2)(ii) (2013).

145. 17 C.F.R. § 230.502(b) (2017).

146. 17 C.F.R. § 230.502(c) (2017).

147. Economies of scale is defined as “a reduction in the cost of producing something (as a car or a unit of electricity) brought about especially by increased size of production facilities.” MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/2YHP-JK4L>.

The challenging hurdle that solar garden projects would need to address is the sophistication of their purchasers. Since the typical customer is an average homeowner or renter, it is highly unlikely that they would individually meet the sophistication requirements established by Rule 506. The only way to satisfy the sophistication requirement is if the unaccredited and unsophisticated investors have a purchasing representative who evaluates the merits on their behalf.¹⁴⁸ A purchasing representative is one who is not an affiliate of the issuer, has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, is acknowledged by the purchaser in writing, and discloses to the purchaser in writing any material relationship between himself and the issuer within the past two years.¹⁴⁹ Because he is a sophisticated business representative, a purchase representative will not be cheap. Unfortunately, this once again challenges the purpose of solar garden projects by adding another expense that will cause potential lower income investors to opt out of solar garden projects.

For this and all of the other transactional exemptions above, the limitation on reselling is potentially detrimental because the initial purchaser needs to hold the interest for the life of the solar panel, which can extend well beyond twenty years, to maintain the exemption.¹⁵⁰ If the structure of the project involves a utility company collecting the energy and deducting it from the customer's bill, a customer would be limited to moving within the coverage of the utility company that has the power purchase agreement with the project. If the customer moves outside of the utility company's coverage, he would need to sell the interest to someone within the coverage or have an interest in something that is no longer providing a benefit. Unless some arrangement can be made with the new utility company, the energy collected by his share in the solar garden would no longer be deducted from his energy bill.

c. Section 3(a)(11): The Intrastate Offering Exemption

Section 3(a)(11) states that "[a]ny security which is part of an issue offered and sold only to persons resident within a single State . . . where the issuer of such security is a person resident and doing business within or . . . incorporated by and doing business within, such State" is exempt from federal securities regulation.¹⁵¹ The intrastate offering exemption,

148. 17 C.F.R. § 230.506(b)(2)(ii) (2013).

149. 17 C.F.R. § 230.501(i) (2017).

150. See Ken Zweibel, *Should Solar Photovoltaics be Deployed Sooner because of Long Operating Life at Low, Predictable Cost?*, 38 ENERGY POL'Y 7519 (2010).

151. 15 U.S.C. § 77c(a)(11) (2012).

although provided in the section designated as exempt securities,¹⁵² is considered a transaction exemption under current legislative and judicial interpretations.¹⁵³ This consideration provides for the ability to resell the interest under this exemption. This exemption would also be beneficial to certain smaller solar gardens because only in-state residents would purchase the interest anyway. This is especially true because the utility company holding the power purchase agreement will likely be focused in a single region, and more specifically within the state that the solar garden is located.¹⁵⁴ Like the other transaction exemptions, there are some conditions that might prove challenging even for local solar gardens.

The SEC has promulgated Rule 147 as a guide to Section 3(a)(11).¹⁵⁵ This Rule addresses issues such as the requirement of securities coming to rest in a certain state and advertising and offering issues.¹⁵⁶ Rule 147 states that the requirement that the securities come to rest in a certain state is satisfied if resales of the security are limited to residents of the state for nine months after the original issuance.¹⁵⁷ Further, engaging in general advertising, using a third-party internet site to promote the issuance, or using its own website or social media to offer securities would not ruin the exemption opportunities for the solar garden entity so long as the entity implements adequate measures to ensure offers only go to residents.¹⁵⁸

These less restrictive measures provided by Rule 147 are helpful for solar gardens because they remove some of the primary issues that solar gardens would have to circumvent pursuant to Section 3(a)(11). The primary issue that the solar garden project must address for this exemption is the distribution of the interests. Under Rule 147, the investor in the solar panel only needs to maintain the interest in that state for nine months; afterwards he can sell it to whomever he wants.¹⁵⁹ Freedom of transferring the security can allow for the full use of the solar panels throughout their life without any decrease for the benefits they provide. The issuer of the security doesn't need to worry about the long-term plans of the potential

152. See 15 U.S.C. § 77c(a) (2012).

153. See COX ET AL., *supra* note 27, at 262.

154. For example, Entergy is regionally in the southeast, in Texas, Louisiana, Mississippi, and Arkansas. See ENTERGY, <https://perma.cc/T3RW-9RRG> (last visited July 8, 2017).

155. See Alan S. Gutterman, *SEC Provides a Guidance on Complying with Rule 147 in Crowdfunding Transactions*, BUS. COUNS. UPDATE, Dec. 2014.

156. See *id.*

157. 17 C.F.R. § 230.147 (2017).

158. Such adequate measures include technological measures that limit communications only to in-state IP addresses. See Gutterman, *supra* note 155.

159. Granted, selling the interest to someone out of state would not be very beneficial because of the power purchase agreement with a specific utility company, which generally does business in a small region.

investor and whether the decision to move will have a negative impact on the exemption of the security. The intrastate exception has this great benefit compared to any true transactional exemption found under Section 4 of the Securities Act.

The loosened requirements regarding advertising also help solar gardens because they allow solar gardens to advertise through technology, something previously not allowed by Section 3(a)(11).¹⁶⁰ By advertising online, the solar garden entity can solicit more potential investors and allow for economies of scale through technology. Lower income consumers, in turn, will have better access to renewable energy because the economies of scale will allow for more, smaller investments.

Unlike the private placement exemption, there are no requirements regarding the nature or number of purchasers of the security to meet the intrastate offering exemption.¹⁶¹ The purchasers do not need to be sophisticated, and there are no requirements about their financial position. This is more in line with the purpose of solar gardens because it allows for smaller investments by lower income individuals, who are the target consumers of solar garden sites.

This exemption, because of Rule 147, does not require much change in order to allow for long-term substantial growth in solar garden accessibility. Because of the loosened rules provided by Rule 147, the burden for solar gardens that meet the intrastate offering exemption are the state regulations, which are likely even more stringent than federal regulations.¹⁶² It is logical to maintain coverage of state security regulations because the purpose of the exemption is to remove unnecessary federal oversight from local investment practices better protected by local regulations.

Unlike the small issues exemption under Rule 504, the intrastate offering exemption has no maximum aggregate price requirement.¹⁶³ The requirement that all of the investors reside in one state is likely less impactful to the size of the solar garden than the maximum aggregate price because of the structure of the typical solar garden project. Since a utility company normally has a power purchase agreement with the solar garden project's host, the project is already inherently local. The size of the project could still be substantial even though it remains in one state. It is likely that the aggregate price of a single solar garden could easily exceed

160. Advertising through the internet has typically been considered advertising in all 50 states.

161. See CORPORATIONS, *supra* note 124.

162. One example of an even more stringent aspect of state security regulations is the merit review, where a state administrator can reject registration if an offering was grossly unfair. See Cohn, *supra* note 132.

163. 15 U.S.C. § 77c(a)(11) (2012).

one million dollars while still only offering and selling the interests to people in a single state.

2. Parting the Clouds: Amending Transaction Exemptions

Clearly, no transactional exemption, on its own, would be beneficial for all solar garden projects. Rule 504¹⁶⁴ and the Intrastate Offering Exemption¹⁶⁵ both expose solar gardens to the full spectrum of applicable state security regulations, which are often more stringent than their federal counterparts. Rule 506,¹⁶⁶ while exempting the security from both federal and state regulations, has a cap on nonaccredited investors at thirty-five, which inhibits the purpose of solar garden projects.

With small changes, these exemptions could be very beneficial in the long run for solar garden projects. If the project is solely in a state that has relaxed their securities regulations beneficially for solar gardens, then fitting the interest in either Rule 504 or the intrastate offering exemption would allow for a very successful venture. Unfortunately, this process would be difficult and time consuming because multiple state laws would need to be changed to meet solar gardens' needs. The investors of the first project in each state would have to lobby with their state legislature to change any security regulations or add exemptions for entities like solar gardens. The proposals would require business and legal representatives to develop an argument and convince their legislators that the projects have merit and deserve to be exempt. Lower income investors would likely stay with their current energy system rather than take the financial risks of funding a lobbying campaign to change state securities regulations.

An ideal solution must address both state and federal regulations, while still being expansive enough to allow for the growth of solar gardens to meet the market demands of accessing the unconventional solar customers that solar gardens are reaching for. A potential answer for this resides in an exemption that already exists: Rule 506. This rule exempts the security from both state and federal securities regulations. An amendment to allow for more than thirty-five unaccredited purchasers would allow for more access to the potential low to middle income consumers because the opportunity for more small investments would be available. Unfortunately, this rule would also have to be moved because no securities under a transactional exemption cannot be resold, which means that the purchasers would be stuck with the security. A regulatory amendment achieving this goal would be difficult to obtain but is not unfeasible. Rule 504 already

164. 17 C.F.R. § 230.504 (2017).

165. 15 U.S.C. § 77c(a)(11) (2012).

166. 17 C.F.R. § 230.504 (2017).

doesn't have a cap on unaccredited purchasers, and securities falling under the intrastate offering exemption can be resold as long as it is in the same state. Thus, these changes to Rule 506 and Section 4(a)(2) would not completely undermine the protections to investors.

Solar garden securities already meet the purpose behind not having a cap on unaccredited purchasers and on allowing the resale of the security. The structure is fairly simple to understand and doesn't change once it is set in place. The energy output of the system is not affected by a third party who could potentially defraud the investors. Even then, the maintenance of the site does not affect the output in any serious way that would require stringent and extensive disclosure or registration with the SEC. Due to the local nature of the project, reselling to subsequent purchasers would necessarily be within the same general area as the original purchaser, and the new purchaser likely knows or could easily be able to gather the same information as the original purchaser. Therefore, changing Rule 506 to meet these new standards would not cause any damage to the protections that federal and state securities regulations promote.

3. Adding a Security Exemption: Opening the Gate for Solar Gardens

The structure of solar garden projects meets both purposes behind security exemptions, and is therefore prone to exemption under this alternate route. These exemptions exist for one of two reasons. The first purpose for exempting a full security is that regulations are unnecessary because the security is already protected by another regulatory scheme focused on that industry.¹⁶⁷ The second purpose behind a security exemption is that the interest is considered less risky, and so the investors do not need the same protections.¹⁶⁸ For security exemptions found in section 3 of the Securities Act, the entire security is exempt from the registration provisions of the 1933 Act.¹⁶⁹ The initial transaction of the security, however, is still covered by the antifraud provisions of the 1933 and 1934 act.¹⁷⁰ Because the entire security is exempt, this allows for the security to be resold without losing the exemption.¹⁷¹

167. See CORPORATIONS, *supra* note 124.

168. See *id.*

169. See COX ET AL., *supra* note 27, at 429.

170. See *id.*

171. See *id.*

Solar garden interests are currently not covered by any security exemptions within the Act of 1933.¹⁷² Solar garden promoters would therefore need to lobby for a new security exemption. As difficult as this sounds, it is a feasible option and is the most beneficial for solar garden projects. Because the energy from the solar garden goes to a utility company and the company deducts the funds from the owner's bill, the utility company would need to document these financial numbers on their disclosures. The investments in the solar garden and the financial activity of the gardens are already protected and disclosed on the utility's financial statements. Therefore, solar garden investments meet the first purpose of security exemptions. The solar garden investment is also financially unambiguous. The consistency and predictability of the solar garden structure make disclosures and registration unnecessary because even the most unsophisticated consumer can have a decent understanding of the process such that the only protections needed are the antifraud provisions that are still in effect with a security exemption.

There are also political benefits to having solar gardens recognized as a security exemption. Expansion of solar energy generation is clearly popular; eighty-nine percent of average US citizens favor expanding the use of solar power.¹⁷³ Providing an amendment that would enable this expansion of solar power is not only good for environmental reasons, but also for political ones. Thus, Congress would likely be interested in legislative strategies for expanding solar power while protecting the consumer.

CONCLUSION

Solar gardens have a lot to offer to the environmental community. Through the local and community-focused structure it currently has, the solar garden model can spread knowledge of environmentally friendly practices and the benefits that renewable energy has on the environment and the economy. There are also many benefits that it can have on community wellbeing and employment.

These benefits are only the start of what solar gardens can do for the nation and the world. By expanding solar gardens beyond neighborhoods

172. See 15 U.S.C. § 77c (2012) (Examples of securities currently exempted under this section include government securities, bank securities, nonprofit securities, short-term notes, and municipal securities).

173. Brian Kennedy, *Americans Strongly Favor Expanding Solar Power to Help Address Costs and Environmental Concerns*, PEW RESEARCH CENTER (Oct. 5, 2016), <https://perma.cc/Y838-KRGN>.

and school districts, solar gardens can become the new primary form of energy production for the nation. This expansion will lead to unprecedented environmental improvement. Security regulations currently hold a potent key to unlocking solar gardens' full potential.

Opening securities regulations for solar gardens will allow more structural freedom for solar garden entities to access unconventional and lower income customers, substantially improving the general awareness of renewable energy and providing all people, not just the wealthy, access to environmentally friendly practices. Currently, transactional exemptions are still a viable option for many solar garden entities because they are smaller in size. For solar gardens to reach their full potential, transactional exemptions need to be changed to give the solar entity broader financial activity options. Alternatively, security exemptions could provide this broader scope, but require legislative or SEC enactment. In the end, amending security regulations is only the first step to a bright future for solar regulations.

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* J.D./D.C.L., 2018, Paul M. Hebert Law Center, Louisiana State University. The author extends his gratitude to Professors Christina Sautter and Keith Hall for their guidance and feedback throughout the composition process. The author would also like to extend an additional thank you to Senior Editor Alex Mouhot and the entire Volume V Editorial Board of the Journal of Energy Law and Resources for all of their feedback and contributions. Finally, the author is most grateful for the love of his wonderful and supportive family and his beautiful fiancée Sarah, for standing by him during the stressful days and long nights.